

**§ 701.11 Publication, indexing, and public inspection of certain classes of records.**

Secretary of the Navy Instruction 5720.45<sup>2</sup>, "Indexing, Public Inspection, and Federal Register Publication of Department of the Navy Directives and other Documents Affecting the Public," assigns the heads of Department of the Navy components, Commanders of the Naval Systems Commands, and the Military Sealift Command responsibilities for executing the following additional requirements on records under their respective cognizance:

(a) Publication of certain classes of Department of the Navy organizational, regulatory, policy, procedural, interpretative, and substantive records on a current basis in the FEDERAL REGISTER, for the guidance of the public.

(b) Maintenance of current indexes of various classes of records which are precedential for decisions affecting members of the public, and publication of such indexes at least quarterly or making them available to the public by other authorized means.

(c) Making the above records and indexes regularly available for public inspection and copying at naval locations.

**Subpart B—FOIA Exemption Guidelines**

SOURCE: 56 FR 66586, Dec. 24, 1991, unless otherwise noted.

EDITORIAL NOTE: At 56 FR 66586, 66590, Dec. 24, 1991, §§701.21—701.32 (subparts B and C) were revised. Section 701.31 appears at both subpart B and subpart C. The Agency will publish a correction in the FEDERAL REGISTER at a later date.

**§ 701.21 General.**

(a) The FOIA is a disclosure statute whose goal is an informed citizenry. Because of this records are considered to be releasable unless they contain information that qualifies for withholding under one or more of the nine FOIA exemptions. The exemptions are identi-

fied as 5 U.S.C. 552 number (b)(1) through (b)(9).

(b) Even though a document may contain information which qualifies for withholding under one or more FOIA exemptions, FOIA requires that all "reasonably segregable" information be provided to the requester, unless the segregated information would have no meaning. In other words, redaction is not required when it would reduce the balance of the text to "unintelligible gibberish."

(c) The decision to withhold information in whole or in part based on one or more of the FOIA exemptions requires the signature of an Initial Denial Authority (IDA). See paragraph (e) of § 701.5 for a listing of IDAs.

(d) The following types of records may be withheld in whole or in part from public disclosure under FOIA, unless otherwise prescribed by law. A discretionary release to one requester may preclude the withholding of the same records under a FOIA exemption if the record is subsequently requested by someone else. In applying exemptions, the identity of the requester and the purpose for which the record is sought are irrelevant with the exception that an exemption may not be invoked where the particular interest to be protected is the requester's interest.

**§ 701.22 Exemption (b)(1).**

Those properly and currently classified in the interest of national defense or foreign policy, as specifically authorized under criteria established by Executive Order (i.e., Executive Order 12356) and implemented by regulations. Although material is not classified at the time of the FOIA request, a classification review may be undertaken to determine whether the information should be classified. The procedures in OPNAVINST 5510.1H, "Department of the Navy Information and Personnel Security Program Regulation" apply. In addition, this exemption shall be invoked when the following situations are apparent:

(a) The fact of the existence or non-existence of a record would itself reveal classified information. In that situation, naval activities shall neither confirm nor deny the existence or non-existence of the record being requested.

<sup>2</sup> Copies may be obtained if needed, from the Commanding Officer, U.S. Naval Publications and Forms Center, 5801 Tabor Avenue, Philadelphia, PA 19120-5099.

A “refusal to neither confirm nor deny” response must be used consistently, not only when a record exists, but also when a record does not exist. Otherwise, the pattern of using a “no record” response when a record does not exist, and a “refusal to neither confirm nor deny” when a record does exist will itself disclose national security information. That kind of response is referred to as a “Glomar” denial.

(b) Information that concerns one or more of the classification categories established by Executive order and OPNAVINST 5510.1 series, “Department of the Navy Information and Personnel Security Program Regulation,” shall be classified if its unauthorized disclosure, either by itself or in the context of other information, reasonably could be expected to cause damage to the national security.

**§ 701.23 Procedures for processing classified documents.**

(a) The threshold for claiming exemption (b)(1) is that the document is properly and currently classified. Because of that, naval activities should normally refer requests for classified documents to the activity that originally classified the information. If the referring activity has an interest in the matter, they should also provide the receiving activity with a release determination. The receiving activity will then conduct a declassification review and apprise the requester of their determination, i.e., documents are properly and currently classified and therefore must be denied; portions of the documents are releasable; etc. Only an official authorized under § 701.5 to deny requests and who has cognizance over the classified matters in the records, may deny records. Such denial must be based on an approved security classification guide issued under OPNAVINST 5510.1 series or OPNAVINST 5513 series; resource document originated by another naval activity or government agency; an original classification determination with written justification for classification, and the justification remains valid; or, not readily identifiable, but classification is believed warranted because of classification criteria in OPNAVINST 5510.1 series, “Department of the Navy

Information and Personnel Security Program.”

(b) Material that is not classified at the time of the FOIA request may undergo a classification review to determine whether the information should be classified (ensure strict compliance with the provisions of OPNAVINST 5510.1 series regarding classification of information after receipt of a FOIA request).

(c) Executive Order 12356 provides that “information shall be classified as long as required by national security considerations, and time frame no longer triggers automatic declassification.”

(d) If the original classifier of a record receives a request for the record and upon review determines that there is no basis for continued classification, either in whole or part, the record or portions of it should be declassified. The document also undergoes another review to determine whether any other FOIA exemptions apply to the declassified information.

(e) In some instances, the compilation of unclassified information may result in the classification of the record as a whole. This is called the “mosaic” approach—the concept that apparently harmless pieces of information, when assembled together could reveal a damaging picture.

**§ 701.24 Exemption (b)(2).**

Those related solely to the internal personnel rules and practices of an agency. This exemption has two profiles, high (b)(2) and low (b)(2).

(a) Records qualifying under high (b)(2) are those containing or constituting statutes, rules, orders, manuals, directives, and instructions the release of which would allow circumvention of the records thereby substantially hindering the effective performance of a significant function of the Department of the Navy. Examples include:

(1) Those operating rules, guidelines, and manuals for Department of the Navy investigators, inspectors, auditors, or examiners that must remain privileged in order for the naval activity to fulfill a legal requirement.

(2) Personnel and other administrative matters, such as examination questions and answers used in training